No. 85-1222 and No. 85-1267

In The

Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

STATE OF TEXAS,
Respondent,

AND

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY

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QUESTION PRESENTED

May the Interstate Commerce Commission, under 49 U.S.C. 10505 and 49 U.S.C. 11501, exempt from regulation the motor truck portion of intrastate TOFC/COFC service performed by a rail carrier as part of a continuous intermodal move, consistent with its exemption of interstate TOFC/COFC service?

LIST OF PARTIES

State of Texas was petitioner in the case below in the Fifth Circuit Court of Appeals.

United States of America and Interstate Commerce Commission were respondents.

Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company[1] were intervenors in support of United States of America and Interstate Commerce Commission.

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[1] A list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Petitioners may be found in the Petition for Writ of Certiorari filed by Petitioner in No. 86-1267.

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I.

OPINION BELOW

The decision of the Court of Appeals for the Fifth Circuit is reported at 770 F.2d 452 (1985), and a copy appears at page 1a of the Appendix to the Petition for a

Writ of Certiorari (Appendix) filed by the Interstate Commerce Commission in this proceeding. The decision of the Interstate Commerce Commission (ICC) in Docket No. 39627 appears at page 16a of the Appendix.

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II.
JURISDICTION

The judgment below was entered on September 6, 1985. The Court of Appeals entered an order denying petitions for rehearing and the suggestions for rehearing *en banc* on November 15, 1985. A copy of the order is in the Appendix at page 12a. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

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III.
STATUTES INVOLVED

The statutes involved in this proceeding are 49 U.S.C. 11501, 10505, and 10101a. Copies may be found at pages 30a, 37a, and 41a of the Appendix, respectively.

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IV.
STATEMENT OF THE CASE

The issue to be decided in this case is whether the State of Texas, which has no authority to regulate intra-

state transportation provided by a rail carrier,[2] may nevertheless assert jurisdiction over a portion of intrastate TOFC/COFC transportation provided by a rail carrier as part of a continuous intermodal move. TOFC/COFC service has been exempted in interstate service and, as shown below, the states are required to follow that federal standard. If the decision below stands, the State of Texas will be able to reassert jurisdiction over intrastate transportation provided by a rail carrier simply by employing a definition of "transportation" which differs from the one used by the ICC and accepted by the courts.

In *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), *aff'd.* in *American Trucking Assns v. Interstate Commerce Commission*, 656 F.2d 1115 (5th Cir. 1981) (*ATA*), the ICC, under 49 U.S.C. 10505, exempted from regulation the movement of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) rail traffic. The exemption included both rail and truck transportation provided by a rail carrier as part of a continuous intermodal move. *ATA, supra*, at 1120.

On September 27, 1982, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company (Railroads), requested the Railroad Commission of Texas (RCT) to apply the same exemption to Texas intrastate rail TOFC/

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[2] The Railroad Commission of Texas lost its authority to regulate intrastate rail rates, classification, rules and practices when it was denied certification by the Commission in Ex Parte No. 388 (Sub-No. 31), *State Intrastate Rail Rate Authority—Texas*, 1 ICC 2d 26 (1984), *aff'd* in *Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C. Cir. 1985) (*RCT*).

COFC traffic.[3] In response, the RCT granted a partial exemption. The exemption covered the rail but not the truck portion of the intrastate TOFC/COFC transportation provided by a rail carrier.

The Railroads then petitioned the ICC under 49 U.S.C. 11501(c) to review the RCT's decision and to grant the full TOFC/COFC exemption. The ICC, in Docket No. 39627. *Petition Under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas,* served January 23, 1984, not printed, granted Railroads' petition and made the exemption fully applicable to Texas intrastate TOFC/COFC transportation provided by a rail carrier. (See Appendix, p. 16a.)

The State of Texas sought judicial review and the Fifth Circuit Court of Appeals rendered the judgment below on September 6, 1985. The Commission held that the ICC did not have the authority to apply the full TOFC/COFC exemption to Texas intrastate transportation provided by a rail carrier. Instead, the Court of Appeals agreed with the RCT that truck service provided by a rail carrier as a part of a continuous intrastate intermodal move was motor carrier service and, therefore, subject to state regulation. *State of Texas v. United States,* 770 F.2d 452 (5th Cir. 1985) (*Texas*). (See Appendix, p. A-1.) The Court reached this conclusion even though

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[3] At that time the RCT had been provisionally certified to regulate intrastate rail transportation. *State Intrastate Rail Authority—P.L. 96-448,* 364 I.C.C. 881 (1981). Railroads' application to the RCT sought an exemption on intrastate TOFC/COFC traffic identical to the interstate exemption granted by the ICC. See Joint Appendix pp. 7-10.

the same circuit had earlier held in *ATA* that such service was rail transportation when performed in interstate commerce. The petitions for rehearing and suggestions for rehearing *en banc* were denied on November 15, 1985. (See Appendix, p. 12a.)

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V.

ARGUMENT

A. THE ICC HAS AUTHORITY UNDER 49 U.S.C. 10505 TO EXEMPT THE MOTOR PORTION OF INTRASTATE TOFC/COFC TRANSPORTATION PROVIDED BY A RAIL CARRIER.

The starting point in analyzing the issue before the Court is the plenary power of Congress under the Constitution. As was held long ago in *Gibbons v. Ogden*, 9 Wheat 1, 195 (1824), Congress' power under the Commerce Clause:[4]

> "is the power to regulate; that is to prescribe the rule by which commerce is to be governed. This power like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than prescribed in the constitution."

Furthermore, this Court has held that

> [t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise

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[4] U.S.C.A. Const. Art. 1, Section 8, Clause 3.

> of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258; 83 S.Ct. 348; 13 L.Ed. 2d 258 (1964).

This Court has also recognized that the Interstate Commerce Act (ICA) is among the most pervasive and comprehensive of federal regulatory schemes. *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile,* 450 U.S. 311, at 318; 101 S.Ct. 1124; 67 L.Ed.2d 258 (1981). And, at least since the turn of the century, this Court has

> "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act." *Chicago & N.W. Tr. Co., supra,* p. 318.

Measured against the power of Congress over interstate and intrastate commerce (as it affects or burdens interstate or foreign commerce), it is clear that Congress delegated sufficient authority to the ICC under 49 U.S.C. 10505 to enable the ICC to exempt both the rail and truck portion of intrastate TOFC/COFC transportation provided by a rail carrier. The ICC's exemption power was intended to give the ICC the broad authority needed to eliminate unnecessary regulation. *Coal Exporters Ass'n of U.S. v. United States,* 745 F.2d 76 (D.C. Cir. 1984); *cert. den.,* 105 S.Ct. 2151; 85 L.Ed.2d 507 (1985).

The ICC's exemption power with regard to intermodal transportation was also clearly recognized by Congress in

the Staggers Rail Act of 1980 (Staggers).[5] 49 U.S.C. 10505(f) provides that

> "[t]he Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement."

This special treatment of intermodal transportation is a clarification of the ICC's general exemption authority provided in 49 U.S.C. 10505(a). This authority was recognized by the court in *Brae Corp. v. United States*, 740 F.2d 1023, at 1044 (D.C. Cir. 1984); *cert. den.*, 105 S.Ct. 2149; 85 L.Ed.2d 505 (1985).

The ICC's power to exempt both the rail and truck portion of TOFC/COFC transportation provided by a rail carrier as part of a continuous intermodal move was upheld by the Fifth Circuit in *ATA*. The Court in *ATA*, in response to an argument that Commission authority to exempt transportation provided by a rail carrier meant only rail transportation, stated

> "[w]e disagree—rail-owned truck TOFC/COFC service is 'transportation that is provided by a rail carrier.' Had the Congress intended to limit the Commission's authority to rail transportation, it could easily have done so by using that language." *ATA*, *supra*, p. 1120.

Congress' power under the Commerce clause is plenary in nature and extends clearly to intrastate regulation as well. Congress has delegated to the ICC power to exempt certain classes of traffic from regulation when certain cir-

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[5] Pub. L. No. 96-448, 94 Stat. 1895.

cumstances are present. The ICC used that power to exempt both the rail and truck portions of TOFC/COFC transportation provided by a rail carrier as part of a continuous intermodal movement. Once the ICC exercised that power to exempt both the rail and truck portions of TOFC/COFC interstate service, the same exemption automatically applied to both the rail and truck portions of intrastate TOFC/COFC service. *Illinois Commerce Commission v. ICC, infra (Illinois).* If the decision below is not overturned, Congress' policy of having uniformity in both interstate and intrastate railroad regulation will be frustrated. This policy, set out in 49 U.S.C. 11501(b)(1), was upheld in *State of Tex. v. United States,* 730 F.2d 339 (5th Cir. 1984); *cert. den.,* 105 S.Ct. 267; 83 L.Ed.2d 203 (1984).

B. THE DECISION BELOW WILL RESULT IN THE CREATION OF UNWORKABLE AND UNNECESSARY DISPARITIES BETWEEN INTERSTATE AND INTRASTATE COMMERCE.

The decision below, if allowed to stand, will enable the RCT to regulate intrastate TOFC/COFC service provided by a rail carrier even though the RCT has absolutely *no* authority to regulate intrastate rail rates, classifications, rules, or practices. The RCT lost its authority because of its persistent and continuous refusal to follow the Federal standards and procedures as required by 49 U.S.C. 11501. See *RCT, supra,* at pp. 224-226.

The denial of certification by the ICC means that the RCT has no jurisdiction at all over intrastate rail transportation pursuant to 49 U.S.C. 11501(b)(4)(B) which provides that

> "[a]ny intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title."

There is no question that the transportation in issue—truck service provided by a rail carrier as part of a continuous intermodal move—is intrastate transportation provided by a rail carrier under 11501(b)(4)(B). The Fifth Circuit has even acknowledged that the transportation in question is transportation by rail carrier. See *ATA*, *supra*, at p. 1120. It is the ICC, therefore, and not the RCT, which has jurisdiction over truck service provided by a rail carrier as part of a continuous intermodal move. The decision below is simply wrong. Unless certified by the ICC, the RCT has no jurisdiction over any intrastate rail transportation.

If the decision below is allowed to stand, an unreasonable and unnecessary disparity in the treatment of interstate and intrastate TOFC/COFC shippers will result. If a TOFC/COFC shipment is interstate and involves truck service provided by a rail carrier as part of a continuous intermodal move, then the shipment is exempt from regulation. The interstate shipper will have the benefit and flexibility of deregulated transportation. On the other hand, an intrastate shipper's TOFC/COFC truck service provided by a rail carrier as part of continuous intermodal move would face more rigid regulations. This disparity is the precise evil that the Staggers Act was designed to eliminate.

Congress, in passing the Staggers Act, concluded that one of the problems facing the railroad industry was the "multiple and diverse regulations at the state level." H.R. No. 96-1035, 96th Cong. 2d Sess. 128 (1980). The solution adopted by Congress is contained in Section 214 of the Staggers Act (49 U.S.C. 11501) which limits "[s]tate authority over intrastate transportation . . . to administering the provisions of the Interstate Commerce Act." H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. 83 (1980). The Conference Committee reported that its intent was to

> "ensure the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules and practices. States may only regulate in these areas if they are certified under the procedures of this section." H.R. Conf. Rep. 96-1430, *supra*, p. 106.

Allowing the decision below to stand will frustrate the expressed Congressional policy of uniformity between interstate and intrastate rail regulation. In addition, the Railroads and shippers will suffer real and tangible harm as a result of a double standard. Both interstate and intrastate TOFC/COFC shipments move in the same trailers on the same trains. Yet if the decision below is upheld, the Railroads will be forced to provide different and more expensive handling to intrastate shipments than to interstate shipments, contrary to the intent of Congress in passing Section 11501. The following example is illustrative.

Suppose one shipper wants to make a TOFC shipment from Houston to Texarkana, Arkansas, and another shipper a TOFC shipment from Houston to Texarkana, Texas. Further, suppose the rail carrier the first shipper chose will move the shipment from Houston by rail to Dallas and then via its own truck to Texarkana, Arkansas. That move would be subject to the exemption and would be deregulated. The other shipper wanting to use the same rail service from Houston to Texarkana, Texas, would face quite a different situation. The rail carrier could move the shipment from Houston to Dallas over its tracks, but in order to move the shipment in its own truck service to Texarkana, Texas, it would have to either (1) obtain a certificate from the RCT to operate between Dallas and Texarkana (which would involve publishing tariffs and operating as a regulated motor carrier); or (2) use the services of an independent certificated motor carrier. The cost of using such motor carrier service would make the overall TOFC/COFC move more expensive, and thus non-competitive, with line-haul motor carrier service.

If the RCT is successful in regulating the motor portion of a continuous intermodal move by a rail carrier, it will be able to assert effective economic regulation over the entire intermodal move. The effect of such economic regulation by the RCT is shown by the principle announced in *Oil Field Haulers Association v. Railroad Commission of Texas*, 381 S.W.2d 183, 192-195 (Tex 1964). That case stated that rail rates could be unreasonable if they caused competitve harm to intrastate truck lines even though the rail rates were compensatory to the rail carriers. This Texas rule, which effectively barred rail rate competition with trucks, was abolished by the Staggers Act. The Stag-

gers Act requires the states to apply federal regulatory standards to rail regulation. Nevertheless, Texas seeks in this case to revert to its prior rule by redefining "transportation provided by a rail carrier."

Neither the RCT nor the decision below provides any explanation of why such disparate treatment is needed, required, or even desirable. Both types of services are rail transportation, whether interstate or intrastate. Railroads submit there can be no justification for such disparity of treatment and that such disparity is contrary to the Staggers Act. See *Illinois, infra.* The standards should be the same for both interstate and intrastate shippers and rail carriers.

The example discussed above is similar to the example discussed by the ICC in *State Intrastate Rail Rate Authority-P.L. 96-448,* 367 I.C.C. 149 (1983) (*State*), aff'd in *Illinois, infra.* After discussing an interstate TOFC move from Chicago, Illinois, to St. Louis, Missouri, and an intrastate TOFC move from Chicago to East St. Louis, Illinois, the ICC concluded

> "that Congress did not intend for the continued existence of State regulation that would produce this awkward result—namely, interference with the railroads' and shippers' freedom to take advantage of permitted flexibility in doing business under the Staggers Act." *State, supra,* p. 153.

The Court of Appeals, responding weakly to the reasoning upheld in *Illinois,* stated that

> "to accept uncritically the I.C.C.'s argument that it can exempt intrastate trucking connected with intrastate rail travel from all regulation would be to court potential mischief." *Texas, supra,* p. 454.

The court then discusses the example of a hypothetical Texas intrastate railroad move of TOFC shipments only a small distance by rail and then a long distance by rail-owned truck. This example of a sham transaction is purely the result of hypothesis and conjecture by the court and cannot be found anywhere in the record. However, even if there was such a railroad move, the court does not say why this is a potential mischief and, most importantly, does not balance this unsubstantiated "mischief" against the real problem faced by Texas railroads and shippers if they must handle the truck portion of interstate TOFC as deregulated traffic and the truck portion of intrastate TOFC as regulated traffic.[6] It is worth mentioning that the small intrastate railroad that so worried the court below (if such a railroad exists) would not be subject to ICC regulation unless it connected with an interstate railroad. *Magner-O'Hara Scenic Ry. v. I.C.C.*, 692 F.2d 441 (6th Cir. 1982). The ICA simply cannot be invoked to frustrate state authority where the basis for invoking the Federal authority is, as in the Court's hypothetical, a sham. *Hudson Transportation Co. v. U.S.*, 219 F. Supp. 43 (D.C.N.J. 1963), aff'd *sub nom, Arrow Carrier Corp. v. U.S.*, 375 U.S. 452 (1964).

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[6] Indeed it is clear that under 49 U.S.C. 10523(a)(2) that the truck portion of TOFC service within the rail terminal area is regulated as rail transportation. Under the decision below, the RCT would retain the right to regulate that traffic, and that retention is flatly inconsistent with a federal statutory standard.

C. THE DECISION BELOW UNDERCUTS THE STATUTORY SCHEME UPHELD IN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS DECISION IN ILLINOIS COMMERCE COMMISSION v. I.C.C.

The decision below undercuts the statutory scheme upheld in *Illinois,* 749 F.2d 875 (D.C. Cir. 1984); *cert. den.,* 106 S.Ct. 70 (1985). In *Illinois* the court of appeals affirmed an ICC decision holding that if an exemption on interstate rail transportation is granted by the ICC under 49 U.S.C. 10505, that exemption automatically applies with equal application to intrastate rail transportation. The court of appeals found that

> "[i]n view of the overriding importance of the exemption provisions, it was reasonable for the ICC to conclude that the statute required States to give immediate and automatic effect to federal exemptions." *Illinois, supra,* p. 884.

In fact, the ICC decision which was reviewed in *Illinois* specifically considered the TOFC/COFC exemption in reaching the decision. In *State, supra,* p. 153, the decision reviewed in *Illinois,* the Commission found that

> "[b]ecause section 10505, and its underlying policy, is such a significant aspect of the Staggers Act, Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the Commission."

The ICC's rationale, upheld in *Illinois,* was that different treatment of interstate and intrastate TOFC/COFC traffic "would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and un-

regulated environment." *State, supra,* p. 153. The decision below squarely conflicts with the holding of *Illinois* because it allows a different treatment for interstate and intrastate TOFC/COFC traffic.

The decision below also conflicts with *Illinois* in that it allows the RCT to frustrate application of the TOFC/COFC exemption to the truck portion of that intrastate service provided by a rail carrier. By refusing to recognize that the motor portion of intrastate TOFC/COFC service is service provided by a rail carrier, the court below has allowed the RCT to reassert jurisdiction over intrastate rail rates, classification, rules and practices. That result is completely at odds with the *Illinois* decision which held that exemptions adopted by the ICC automatically become Federal standards that must be applied by the states if they want to continue to regulate intrastate rail rates, classification, rules and practices. See also *Illinois Central Gulf R.R. Co. v. ICC,* 702 F.2d 111 (7th Cir. 1983); *Wheeling-Pittsburgh Corp. v. ICC,* 723 F.2d 346 (3rd Cir. 1983); and *Utah Power & Light Co. v. ICC,* 747 F.2d 721 (D.C. Cir. 1985), *supplemented on rehearing,* 764 F.2d 865 (D.C. Cir. 1985).

It must be remembered that the TOFC/COFC exemption adopted by the ICC and upheld by the Fifth Circuit in *ATA, supra,* at p. 1120, found that rail-owned truck TOFC/COFC service was indeed transportation provided by a rail carrier. Under the rationale of *Illinois,* the RCT was obliged, under its provisional certification in effect at that time, to apply the full TOFC/COFC exemption to Texas intrastate rail transportation.

The result of the decision below is to create a basic conflict between the Fifth Circuit and the District of Columbia

Circuit over whether the Congress, acting through the ICC, or the states have the final say over what constitutes service provided by a rail carrier. While conceding that the ICC does have jurisdiction over intrastate rail transportation (See *Texas, supra,* at p. 454), the court below nevertheless allows the RCT to reassert jurisdiction over the intrastate rail transportation by saying that the truck portion of a continuous intermodal move provided by a rail carrier is actually motor carrier service. If the RCT is allowed to reassert jurisdiction in this manner, the Congressional preemption of intrastate rail regulation will be undercut. See *Illinois, supra,* at p. 878. Railroads believe the *Illinois* court is correct in holding that the ICC has the necessary power and authority to determine the applicability of its exemptions to intrastate rail transportation. The court below held that the states may determine the applicability of exemption to intrastate rail transportation and Railroads believe the court below was in error.

D. THE DECISION BELOW IS ALSO CONTRARY TO THIS COURT'S RECENT PRECEDENT.

In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board,* 474 U.S. —; 106 S.Ct. 709; 88 L.Ed.2d 732 (1986) (*Transco*), this Court considered the power of the states to regulate in areas Congress has decided are to be governed by market forces. In that case, the question was whether Congress had intended to give power to the states that it had denied to the Federal Energy Regulatory Commission (FERC). This Court stated clearly that

> "[i]n light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." *Transco, supra,* 88 L.Ed. 2d 744.

That finding is based on the premise that

> "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision to regulate (emphasis in original)." *Transco, supra,* at p. 744.

The action of the State of Mississippi in that case was also found to be contrary to federal policy because the action would disrupt the uniformity of the federal regulatory scheme and would raise the ultimate price of natural gas to consumers. *Transco, supra,* at p. 745.

The facts in this case are closely analogous to those in the *Transco* case. As in the *Transco* case, Congress in passing the Staggers Act, decided to rely more on market forces and less on regulation with regard to rail service. In 49 U.S.C. 10101a(1)(2), Congress has declared federal policy to be "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;" and "to minimize the need for Federal regulatory control over the rail transportation system . . . ." Further, as discussed above, Congress clearly preempted state regulation in 49 U.S.C. 11501 in order to carry out the policy to "assure that intrastate regulators' jurisdiction is exercised in accordance with [federal] standards." 49 U.S.C. 10101a(9).

Applying the holding of *Transco* to the facts in this case, it becomes clear that the decision below cannot stand. Congress, in the Staggers Act, decided to rely on less regulation and Texas is not free to step in and replace that regulation. In addition, if Texas is allowed to regulate the motor portion of intrastate TOFC/COFC transpor-

tation provided by a rail carrier, the result as in *Transco* would be to disturb the uniformity of the federal regulatory scheme and would ultimately raise prices to shippers in Texas. Interstate and intrastate TOFC/COFC shipments would have to be handled differently even though moving in the same trains and on the same flatcars. Railroads would incur higher costs because of the disparate handling and the shippers would have to pay these costs.

The decision below cannot be reconciled with this Court's decision in *Transco*. If anything, the facts at issue here are more egregious because the Staggers Act clearly preempts state rail regulatory authority except where the state regulates in accordance with federal standards and procedures.

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VI.

CONCLUSION

Wherefore, railroads respectfully request the Court to reverse the decision below.

Respectfully submitted,

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